

NO. 49368-3-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

ANGEL MICHALAK,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary Tabor, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENT OF ERROR

Improper opinion as to appellant's intent violated her constitutional right to a jury trial and requires reversal.

Issue pertaining to assignments of error

Appellant was charged with third degree assault based on allegations that she kicked a law enforcement officer who was performing his official duties. There was no dispute that appellant's foot made contact with the officer's leg, but the parties disputed whether the contact was intentional. Did the officer's testimony that appellant acted intentionally constitute improper opinion which violated appellant's right to a jury trial?

B. STATEMENT OF THE CASE

1. Procedural History

On September 17, 2014, the Thurston County Prosecuting Attorney charged appellant Angel Michalak with third degree assault, alleging she assaulted a law enforcement officer performing his official duties at the time of the assault. CP 1-4; RCW 9A.36.031(1)(g). The case proceeded to jury trial before the Honorable Gary R. Tabor, and the jury returned a guilty verdict. CP 17. The court ordered a first time offender sentencing waiver, imposing six days in jail, a substance abuse evaluation

and treatment, and community custody. CP 54-57. Michalak filed this timely appeal. CP 63.

2. Substantive Facts

On September 13, 2014, Tumwater Police Officers were dispatched to a disturbance at a gas station, advised that two subjects were lying on the ground and one was punching a wall. 1RP¹ 43. When the first officers arrived at the scene, Officer Russell Mize spoke to the male subject, identified as Michael Cook, and Officer Tyler Boling spoke to the female subject, Angel Michalak. 1RP 44, 69.

Boling asked Michalak what was going on. She was sitting on the ground facing the wall and said she did not want to talk to him, telling him to leave her alone. 1RP 45. Boling wanted to separate Cook and Michalak to get independent statements, so he asked Michalak to stand up and walk over to his car. 1RP 46. Michalak stood up and asked if she was under arrest. She then said Boling could not arrest her and asked him what her rights were. 1RP 47. Boling repeated that he wanted to know what was going on and again asked Michalak to step over to his car. Michalak asked if she was being detained, said Boling could not detain her, and said she did not have to do what he asked. 1RP 47.

¹ The Verbatim Report of Proceedings is contained in two volumes, designated as follows: 1RP—7/11/16 and 7/12/16; 2RP—8/24/16.

At that point, Boling grabbed Michalak's arm firmly above the elbow and tried to walk her to the patrol car. 1RP 47. Michalak began pulling away from him and again sat down, flailing her arms and legs. 1RP 48. Michalak's foot came into contact with Boling's right leg, and he quickly stepped to the side so her foot would not make further contact. 1RP 56-57. Boling grabbed Michalak's hair and held her there while two other officers handcuffed her. 1RP 50.

Michalak was very upset and she continued to yell as she was being arrested, handcuffed, and transported to the jail. 1RP 51. She asked about her rights and said repeatedly that she was being arrested for crying or being depressed. 1RP 100. As Michalak was being arrested, Cook told Mize that she had had a lot of issues that day and she was very intoxicated. 1RP 72.

Videos from three of the patrol cars at the scene were admitted into evidence at trial. The first, from Mize's car, shows Mize talking to Cook before and after Michalak's arrest. It also shows Boling pulling Michalak toward his patrol car over her objection, Michalak going to the ground, and her foot making contact with Boling's thigh as she resists his attempt to move her. 1RP 66; Exhibit 1.

In the second video, Officer Eikum's patrol car arrives at the scene as Boling is moving Michalak toward his car. She is seen going to the

ground, but the contact between Boling and Michalak is off screen until the camera position is adjusted, at which point three officers are holding Michalak down and handcuffing her. The actual contact charged as assault is not depicted. 1RP 85; Exhibit 2.

The third video, from Officer Finch's patrol car, starts pointed at the storefront. Cook is visible in the foreground, and Boling and Michalak can be seen moving behind him, although their actions are partially obscured by Cook. The video continues through Michalak's transport to the jail. She can be heard asking why she is being arrested, saying she did not do anything, and saying repeatedly that she is being arrested for crying, being depressed, and being abused. 1RP 95; Exhibit 3.

After Boling testified that Michalak had kicked him during the course of their contact, the prosecutor asked, "Did it appear that this was just an unintentional flay or did this appear to be directed at you?" Boling responded, "No, it was directed at me." When the prosecutor asked how he could say that, Boling responded, "Because she kicked at me. If she was just kicking, I would have never got hit." 1RP 52.

In closing, the State argued that there was no dispute as to the date or location of the incident, no dispute that Boling was a law enforcement officer performing his official duties, and no dispute that Michalak kicked Boling. The only element of the charge in dispute was whether the kick

was intentional. 1RP 136, 139, 144, 147. The State argued that Michalak did not have to know that her act would constitute a specific crime. Thus, the question was not whether she intended to commit assault but whether she intended to kick Boling. 1RP 144. It argued that the evidence showed Michalak intentionally kicked Boling while he was in the process of investigating a possible domestic violence situation. 1RP 147.

The defense agreed that there was no question there was physical contact, but the issue for the jury was whether there was intent. 1RP 148. Counsel argued that Michalak's confusion about why she was arrested demonstrated that she did not even know she had kicked Boling, much less done so intentionally. 1RP 149. Instead, the evidence showed that she intended to get away, she did not want to be detained, and she did not want to talk. Boling shoved her to the ground, and she was flailing, but the State had not shown intent to make contact or injure Boling. 1RP 150-51.

C. ARGUMENT

OFFICER BOLING'S IMPROPER OPINION AS TO MICHALAK'S INTENT, THE CORE ISSUE AT TRIAL, VIOLATED MICHALAK'S CONSTITUTIONAL RIGHT TO A JURY TRIAL AND REQUIRES REVERSAL.

Michalak was charged with third degree assault, which required the State to prove she assaulted a law enforcement officer who was

performing his official duties at the time of the assault. RCW 9A.36.031(1)(g). The jury was instructed that “[a]n assault is an intentional touching or striking of another person that is harmful or offensive regardless of whether any physical injury is done...” and “[a]n assault is also an act, with unlawful force, done with intent to inflict bodily injury upon another...” CP 25. The parties acknowledged at trial that the only element in dispute was Michalak’s intent. During direct examination of Boling, the State asked for and Boling provided his opinion that Michalak had kicked him intentionally. 1RP 52. Despite defense counsel’s failure to object, reversal is required because this improper opinion as to the core issue at trial invaded the province of the jury.

It is well established that a witness may not offer an opinion as to the defendant’s guilt, either by direct statement or by inference. State v. Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008); State v. Black, 109 Wn.2d 336, 348, 745 P.2d 12 (1987); State v. Hudson, 150 Wn. App. 646, 208 P.3d 1236, 1239 (2009). Such improper opinion testimony violates the defendant’s constitutional right to a jury trial, because the questions of guilt and veracity are reserved solely for the jury. Montgomery, 163 Wn.2d at 590; State v. Kirkman, 159 Wn.2d 918, 927, 155 P.3d 125 (2007) (citing State v. Demery, 144 Wn.2d 753, 759, 30 P.3d 1278 (2001)); State v. Dolan, 118 Wn. App. 323, 329, 73 P.3d 1011

(2003). Thus, an explicit or nearly explicit opinion on the defendant's guilt can constitute a manifest constitutional error, which may be challenged for the first time on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a).

Whether testimony constitutes improper opinion as to the defendant's guilt depends on the circumstances of the case. In making this determination, the court considers such factors as (1) the type of witness, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the type of defense, and (5) the other evidence before the trier of fact. Montgomery, 163 Wn.2d at 591; State v. Johnson, 152 Wn. App. 924, 931, 219 P.3d 958 (2009). Courts have recognized, however, that some areas are clearly inappropriate for opinion testimony in criminal trials, including personal opinions as to the guilt of the defendant and the intent of the accused. State v. Quaale, 182 Wn.2d 191, 200, 340 P.3d 213 (2014); Montgomery, 163 Wn.2d at 591; Demery, 144 Wn.2d at 759.

In Quaale, the defendant was charged with felony driving under the influence. The trooper who pulled him over conducted a Horizontal Gaze Nystagmus test, and over defense objection, he was permitted to testify he had no doubt defendant was impaired based on that test. Quaale, 182 Wn.2d at 194-95. The Supreme Court held that this testimony from the trooper constituted an improper opinion on guilt by inference because

it went to the core issue and only disputed element, whether the defendant drove while under the influence. Id. at 200. The improper opinion on guilt violated the defendant's constitutional right to have a fact critical to his guilt determined by the jury. Id. at 201-02.

Here, as in Quaale, the arresting officer gave his opinion as to the only disputed element of the charged offense, whether Michalak intentionally assaulted Boling. While Boling could testify to what he saw, his personal opinion as to Michalak's intent was clearly inappropriate and violated Michalak's constitutional right to have this critical fact determined by the jury. See Quaale, 182 Wn.2d at 200-02. This explicit or nearly explicit opinion on Michalak's guilt constitutes a manifest constitutional error which this Court may review on appeal. Kirkman, 159 Wn.2d at 936; RAP 2.5(a).

"Constitutional error is harmless only if the State establishes beyond a reasonable doubt that any reasonable jury would have reached the same result absent the error." Quaale, 182 Wn.2d at 202. The question is not whether there is other evidence which would support the verdict but whether the jury necessarily would have reached the same verdict even without the improper evidence. Thus, the Supreme Court held the admission of improper opinion in Quaale, that the defendant was impaired based solely on the HGN test, required reversal, despite evidence

that the defendant had lost control of his vehicle and had a strong odor of intoxicants on his breath. Id. at 194, 202. The improper opinion carried an aura of scientific certainty which, under the circumstances, likely increased the weight the jury attached to it. The error could therefore not be deemed harmless. Id. at 202.

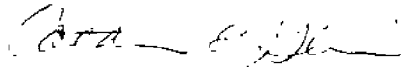
In this case, the State cannot establish beyond a reasonable doubt that any reasonable jury would have reached the same verdict absent the error. There was testimony that Michalak was escalating and out of control as Boling tried to forcibly move her to his patrol car. 1RP 69-70, 74. The videos showed her flailing when she went to the ground, and her statements after her arrest indicated she was not aware she had kicked Boling but instead believed she was being arrested for crying in a parking lot. A reasonable jury could find from this evidence that Michalak did not intentionally kick Boling. Officer Boling's opinion on this core issue likely carried a lot of weight with the jury on this crucial determination. See Demery, 144 Wn.2d at 765 (testimony from law enforcement officer carries "special aura of reliability"). The State cannot prove that the improper admission of Boling's opinion was harmless beyond a reasonable doubt, and Michalak's conviction must be reversed.

D. CONCLUSION

Improper opinion testimony as to the core issue at trial violated Michalak's right to a jury trial, and her conviction must be reversed.

DATED February 2, 2017.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Catherine E. Glinski", written over a horizontal line.

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Certification of Service by Mail

Today I caused to be mailed copies of the Brief of Appellant and Designation of Exhibit in *State v. Angel Michalak*, Cause No. 49368-3-II as follows:

Angel Michalak
6302 Littlerock Road SW Apt A
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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Catherine E. Glinski
Done in Manchester, WA
February 2, 2017

GLINSKI LAW FIRM PLLC

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